

# EXHIBIT EE

1 Page 1

2 CONFIDENTIAL

3  
4 IN THE UNITED STATES DISTRICT COURT  
5 FOR THE SOUTHERN DISTRICT OF NEW YORK  
6 Case No. 1:17-cv-03982-AJN

7 -----  
8 SUZANNA BOWLING, : Videotaped  
9 Individually and on : Deposition of:  
10 behalf of all others :  
11 similarly situated, : COLIN B. WEIR  
12 :  
13 Plaintiff, :  
14 vs. :  
15 :  
16 JOHNSON & JOHNSON and :  
17 McNEIL NUTRITIONALS, :  
18 LLC, :  
19 :  
20 Defendants.  
21 -----:

22  
23  
24 TRANSCRIPT of testimony as taken by and  
25 before PATRICIA A. SANDS, a Shorthand Reporter  
before Notary Public of the States of New York and  
New Jersey, at the offices of O'MELVENY &  
MYERS, 7 Times Square, New York, New York, on  
Thursday, September 6, 2018, commencing at  
10:10 in the forenoon.

Job No. CS 2998017

## CONFIDENTIAL

1           If you were to go to Gilligan's Island and  
2 ask the Howell's how much would you pay for a  
3 boat ride off of the island, they are wealthy,  
4 so they would probably tell you something like  
5 untold millions, just get us off the island, we  
6 never want to see Gilligan again. And that  
7 doesn't help you figure out what the market  
8 value of that boat ride home is.

9           But if you go tell the Howell's that  
10 someone's coming to the island in thirty  
11 minutes with a boat ride to take them home and  
12 the -- and the market price for that is \$4,000,  
13 and they indicate that they will pay the  
14 \$4,000. Now you start to get information about  
15 a market clearing price.

16          And if you were to survey just the  
17 Howell's, that might not be sufficient  
18 information, but if you do a sample of the cast  
19 members and talk to Ginger and Mary Ann and the  
20 Howell's and the professor, then suddenly you  
21 can get some information about what the true  
22 market value for a boat ride home from  
23 Gilligan's Island would be through the use of  
24 the realistic and actual market price points  
25 for boat rides, rather than something like

## CONFIDENTIAL

1                   willingness to pay.

2                   So tying it back to this case,

3                   Dr. Dennis's use of the real world market price  
4                   data in his survey, allows him to calculate the  
5                   true market valuation of the challenged claims,  
6                   rather than maximum willingness to pay for  
7                   products that make those claims.

8                   Q         Would it affect your Gilligan's  
9                   Island scenario if five more boats showed up  
10                  with different price points, making it possible  
11                  for the members of the cast away crew to kind  
12                  of choose something other than the boat that's  
13                  arriving only in 30 minutes for \$4,000?

14                  A         So it depends on what type of  
15                  analysis we're trying to do in Gilligan's  
16                  Island. I would say if the consumers were  
17                  faced with different price points in the  
18                  market, you would want to reflect a range of  
19                  those market price points in the survey, and  
20                  that is what Dr. Dennis has done.

21                  But if you're talking about offering  
22                  consumers the chance to take a purchase that  
23                  they have made in history, undo that  
24                  transaction and make a different transaction,  
25                  uhm, that would not be the appropriate way to

CONFIDENTIAL

1           look at things in this case, because A, sales  
2           of the class products have already taken place  
3           and are fixed as a matter of history, and it  
4           would drive the calculation instead of being a  
5           price premium to being a full refund, because  
6           in order for a class member to undo their  
7           transaction and buy another product, they would  
8           have to get all of their money back.

9           Q       And if -- I hate to link it to  
10           Gilligan's Island.

11           A       You don't like it?

12           Q       Not a fan. I guess what I'm trying  
13           to understand is your view about what real  
14           world data reflects, in terms of reflecting  
15           market conditions at the time. You talked  
16           about fixed as a matter of history, your report  
17           references how the data reflects other  
18           conditions. You just spoke just now about how  
19           the data that was analyzed at the time reflects  
20           all of the variations in retail prices.

21           So is it your view that using those data  
22           helps establish in a point in time what, uhm --  
23           the market conditions during the class?

24           MR. MARCHESE: Objection to form.

25           THE WITNESS: Yeah, I'm afraid with

CONFIDENTIAL

1                   the preamble, I didn't quite follow the  
2                   whole question. If you could ask it again  
3                   I would appreciate that.

4                   Q        Well, I will try to come back to it.  
5                   If you look at paragraph 12 of your  
6 report.

7                   A        (Referring to document.)

8                   Q        It says here it's possible to  
9                   determine class-wide damages using defendants'  
10                  own available business records, third-party  
11                  records, and industry resources.

12                  In what sense is it possible to determine  
13                  class-wide damages using defendants' records?

14                  A        Some of the sales data that I  
15                  obtained came from defendant, as I understand  
16                  it. So that would be an example of a  
17                  defendant's business record that would fit into  
18                  the calculus of damages in this case.

19                  Q        But, so you're saying that that sales  
20                  data is necessary for the conjoint analysis?

21                  MR. MARCHESE: Objection to form.

22                  THE WITNESS: I don't know that it's  
23                  necessary for the conjoint analysis, but I  
24                  used it to inform my understanding of the  
25                  market prices that were extant during the

CONFIDENTIAL

1           A     What I had was information by state,  
2                 and information on a nation -- on a nationwide  
3                 basis. And I have tabulated both on a  
4                 nationwide basis and on a state-by-state basis  
5                 what that data looks like.

6           Q     And were there any gaps on the  
7                 state-by-state basis, do you recall?

8           A     I don't recall as I sit here right  
9                 now, but none is jumping to mind.

10          Q     Do you have an opinion about  
11                 statutory damages in this case?

12          A     My opinion is that subject to the  
13                 guidelines set forth in the statute that have  
14                 been described to me by counsel for plaintiffs,  
15                 the necessary data is available to determine  
16                 those statutory damages.

17          Q     And is it fair to say that you have  
18                 multiplied the number of units sold by the  
19                 statutory damages amounts to reach that  
20                 statutory damages amount?

21          A     After aggregating the sales data for  
22                 New York purchases, yes. You multiply the  
23                 number of injuries, which is the number of  
24                 units sold, if plaintiffs established their  
25                 theory of liability by the statutory remedies

CONFIDENTIAL

1 which are 5 or \$500.

2 Q So to aggregate the number of sales  
3 you just added them up; is that right?

4 A Again, I have to look at the  
5 nationwide and the state by state, but yes, I  
6 add up the New York sales data from a number of  
7 different data sources.

8 Q So you add you up the sales data, you  
9 multiply it by the statutory amount, and that's  
10 your opinion on the statutory damages amount,  
11 subject to plaintiffs establishing their theory  
12 of liability?

13 A Right. Again, I'm not offering an  
14 opinion as to whether statutory damages should  
15 or should not be granted, but if they are  
16 granted, then I have provided the math in order  
17 to understand what the economic result would  
18 be.

19 Q Do you think an expert is necessary  
20 to add sales and multiply them by the number?

21 A I certainly would hope -- I certainly  
22 hope that the judge or the jury would be  
23 capable of the multiplication.

24 I think that I have been asked to do the  
25 work that I've been done to help summarize the

CONFIDENTIAL

1 sales data in a way that would be useful for  
2 the jury to pull together in order to do that  
3 multiplication. And since I pulled the sales  
4 data together, it was easy for me to do that on  
5 their behalf.

6 Q Okay. Just one moment.

7 All right, Mr. Weir, can we just turn back  
8 to your CV. I'm looking at Exhibit 1 to your  
9 report, which is Weir 2.

10 A Okay, I'm with you there.

11 Q All right. You submitted this on  
12 July 30th. Is there anything that you'd like  
13 to add that has occurred to your testimony or  
14 publications, or anything that has happened  
15 since July 30th?

16 A I did submit in response to your  
17 document request, the latest version as of a  
18 few days ago.

19 Q Okay.

20 A So I would say this was current and  
21 correct to the best of my understanding as of  
22 the date. There are new additional pieces of  
23 testimony in that new CV, and it would be much  
24 more expedient to just look at that rather than  
25 have me try and remember the case captions.

CONFIDENTIAL

1 Q Sure. So you mentioned that you've  
2 testified -- well, actually, you know what, I'm  
3 not sure I remember. You gave an estimate of  
4 how many times you have testified this year in  
5 a deposition.

6 A I said maybe 15, but --

7 Q Maybe 15. Have you testified at  
8 trial?

9 A Ever or this year?

10 Q No, ever.

11 A Yes.

12 Q How many times?

13 A I think I have given trial testimony  
14 three times.

15 Q When was that?

16 A Do you just want the case captions  
17 from here, is that helpful?

18 Q Just general.

19 A In my first time being disclosed as  
20 an expert, I gave testimony at trial. So that  
21 would have been, I think 2007 or very early  
22 2008. And then that case had a follow-on,  
23 where the plaintiffs sought to pierce the  
24 corporate veil of the company, and sued  
25 individuals, but it was a similar case. I

Page 213

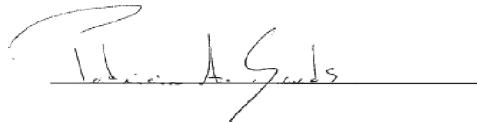
CONFIDENTIAL

1 C E R T I F I C A T E  
2

3 I, PATRICIA A. SANDS, a Shorthand Reporter  
4 and Notary Public of the States of New York and  
5 New Jersey, do hereby certify that prior to the  
6 commencement of the examination the witness was  
7 sworn by me to testify the truth, the whole  
8 truth and nothing but the truth.

9  
10 I do further certify that the foregoing is  
11 a true and accurate transcript of the testimony  
12 as taken stenographically by and before me at  
13 the time, place, and on the date hereinbefore  
14 set forth.

15  
16 I do further certify that I am neither of  
17 counsel nor attorney for any party in this  
18 action, and that I am not interested in the  
19 event nor outcome of this litigation.

20  
21  
22   
23

24 New York Certificate No.: 01SA4974309  
25

New Jersey Certificate No.: 2109345